No. 3383.

IN THE

United States Circuit Court of Appeals

In and for the Ninth Judicial Circuit,
United States of America

UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

RAINIER BREWING COMPANY, a corporation, LOUIS HEINRICH and R. SAMET,
Defendants in Error.

Writ of Error from United States District Court for the Northern District of California, First Division.

BRIEF OF PLAINTIFF IN ERROR

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FILED

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STATEMENT OF FACTS.

On the 3rd day of July, 1919, an information was filed by the United States Attorney for the Northern District of California, charging the defendants in error with the violation of the War-time Prohibition Act (Act of November 21, 1918).

Thereafter, on the 14th day of July, 1919, the defendants in error demurred to the information.

The demurrer was argued and submitted and on the 28th day of July, 1919, the District Court rendered a decision sustaining the demurrer and on the same day judgment was entered dismissing the information.

The language of the Act of November 21, 1918, pertinent to this issue is as follows:

> "* * * No beer, wine, or other intoxicating malt or vinous liquor shall be sold for beverage purposes, * * *"

The information charged that the defendants did:

> "* * * in violation of the Act of November 21, 1918, wilfully, unlawfully and knowingly sell to one Jerry Sheehan for beverage purposes and not for export ten (10) boxes, each containing two (2) dozen bottles of beer, which beer contained as much as one-half of one per cent of alcohol by both weight and volume * * *"

Defendants demurred generally and on the ground that:

> "The said information does not state facts sufficient to constitute a public offense, in that it is not alleged therein nor does it appear therefrom, that the beer alleged to have been sold by the defendants was of an intoxicating malt or vinous liquor, or an intoxicating liquor."

The matter at issue and in contention here is the construction of the language of the act quoted supra.

The gist of the matter is: Must it be alleged, and consequently proved, in operating under this act, that the beer, subject of the sale, is intoxicating.

Plaintiff in Error submits that it is not necessary.

Plaintiff in Error has assigned the following errors:

I.

That the said District Court erred in sustaining the demurrer of defendants to the information of plaintiff on file therein on the grounds set forth in said demurrer.

II.

That the District Court erred in dismissing the information of plaintiff on file therein.

III.

That the said District Court erred in not giving, making and entering its order in said action, overruling the demurrer of defendants to the information on file therein.

IV.

That the said District Court erred in sustaining the demurrer of defendants to the information of plaintiff on file therein, inasmuch as it appeared from said information that defendant wilfully, unlawfully and knowingly, sold for [21] beverage

purposes and not for export, beer which contained as much as one-half of one per cent of alcohol by both weight and volume, in violation of the Act of November 21st, 1918.

ARGUMENT.

The presentation of the contention of Plaintiff in Error will be made under the following heads:

1. The history and purpose of the act.

2. All beer irrespective of its intoxicating properties is within the statute.

3. Under the terms of the statute beer is defined as intoxicating irrespective of its alcoholic content.

HISTORY AND PURPOSE OF THE ACT.

This statute was enacted under the war power. It had its inception at a time when the United States, together with its assoicated powers, was putting forth its utmost efforts to win the war. No consideration of private inconvenience or loss was to stand in the way of the effective and successful prosecution of the war. Nor was it a time for the placing upon the statute books of law which was not capable of prompt, efficacious and uniform enforcement. Action, not discussion, was sought and needed.

The purpose of the Act is stated to be "conserving the man power of the Nation and to increase

efficiency in the production of arms, munitions, ships, food and clothing for the Army and Navy." Its purpose was to withdraw man power from activities not essential to the winning of the war in order that this same man power might be applied to those activities directly necessary to the successful prosecution of the war. Such a purpose would equally embrace beverages non-intoxicating as well as intoxicating.

To accomplish this purpose Congress forbid the sale of certain beverages whose well-known large production and consumption constituted a heavy drain upon both the man and food resources of the country.

Doubtless for this reason and perhaps also because they were regarded as injurious to man power the manifest purpose of Congress was to class generally as non-essential *alcoholic* beverages. Accordingly the Act prohibits, by name, the best known and most largely consumed beverages of this class, i. e., distilled spirits, beer and wine, beverages which are generally recognized as more or less intoxicating. And to embrace other similar but less well known beverages there were added the words "or othes intoxicating malt or vinous liquor."

An Act of Congress must if possible be so construed as to give effect to every part. If it had been the intention of Congress to leave it to the jury in each case to determine whether a particular malt or vinous liquor is intoxicating and to prohibit only such as may be found in this way to be intoxicating the use of the words "beer" and "wine" was idle. This object would have been accomplished by simply prohibiting "all intoxicating malt and vinous liquors." The plain meaning and intention of Congress and the only way to give effect to these words is to construe that whatever beverages come within the commonly understood meaning of "beer" or "wine" are prohibited and that the prohibition is then extended, by general words, to other beverages which are similar to "beer" and "wine" with respect to being malt or vinous and also with respect to their alcoholic content or intoxicating qualities.

The States have seen this and in passing prohibition laws have always enumerated by name the best known alcoholic or intoxicating liquors and added general language to include other similar beverages. Anl Congress has followed the same course in this Act.

Beer is usually admitted to be an intoxicating beverage and is so classed in the public mind

whether a particular quantity will make a particular man drunk or not.

THE ACT OF NOVEMBER 21, 1918, APPLIES TO ALL BEER, IRRESPECTIVE OF ITS ALCOHOLIC CONTENT AND IRRESPECTIVE OF WHETHER OR NOT IT WOULD BE FOUND ON INVESTIGATION IN COURT TO BE INTOXICATING IN FACT.

The statute is in part as follows:

"After June thirtieth, nineteen hundred and nineteen, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, no beer, wine or other intoxicating malt or vinous liquor shall be sold for beverage purposes except for export."

The first and important thing to observe is that the particular articles enumerated and dealt with are "beer, wine, or other intoxicating malt or vinous liquor." The words "beer or wine" are followed by the general and less definite words, "other intoxicating malt or vinous liquor."

According to established and well-sustained canons of construction the first words, "beer" and "wine," fix and determine the character of the

comprehensiveness, while the expression which follows them must be treated as referring only to things which are ejusdem generis with beer and wine, i. e., to liquors which are in the same general class with that drink named "beer."

Brooms Legal Maxims, side page 651.

Sutherland on Statutory Construction, Sec. 268.

Where general words follow particular words the true rule of interpretation is to construe the general words as applicable only to the same sort of things as those which are particularly mentioned.

Gates & Son Co. vs. *City of Richmond,* 49 S. E. 965.

Casher vs. *Holmes,* 2 Barn. & Ad. 592.

Misch vs. *Russell,* 136 Ill. 22, 26 N. E. 528, 12 L. R. A. 125.

In violation of this rule, defendants in error would interpret the statute to read, "no intoxicating beer, intoxicating wine or other intoxicating male or vinous liquor shall be sold for beverage purposes." By this forced realing no field of operation would be left for the word "beer." It is a cardinal rule in the construction of statutes that some meaning must if possible be given to every part and every word. Beer is a malt liquor and intoxicating malt liquors are covered by the

catch-all phrase of the statute. If the word "intoxicating" is read before beer, then intoxicating malt liquors are covered twice by the statute. Beer is the name of a liquor which is fermented, but not necessarily intoxicating.

Blatx vs. *Rohrbach,* 116 N. Y. 450.

Congress used the word "beer" because it has a widely employed definite meaning, being the common every-day name of a much-liked drink which everybody recognizes by that designation. This thing named "beer," as a practical every-day matter of common sense, was looked upon by Congress as sufficiently harmful or useless or not needed during the war period to justify prohibiting its sale. This meaning of the word is consonant with the conception of the general public, the Courts and the departments of Government for many years.

Henderson vs. *Wickham,* 92 U. S. 159.

Purity Extract Co. vs. *Lynch,* 226 U. S. 192, 204.

For nearly twenty years the Bureau of Internal Revenue has treated beer containing one-half of one per cent or more of alcohol as a malt liquor. It is very significant that during all this time the brewers of the country have acquiesced in this definition of beer and have paid taxes on all beer

containing one-half of one per cent or more of alcohol without protest or litigation. This definition of beer and the standard of content of one-half of one per cent of alcohol, so long enforced by the Bureau of Internal Revenue, received legislative confirmation in the Act of October 3, 1917, Section 307. This legislative confirmation was reiterated in the Revenue Act of February 24, 1919, Sec. 608.

The Act of June 13, 1898 (32 Stat. 448) imposed a tax on "all beer, lager beer, ale, porter and other similar fermented liquors brewed or manufactured and sold," etc.

The Act of April 12, 1902 (30 Stat. 96) imposed a tax on all beer, etc., in the same language. This statute (Sec. 3339 R. S.) continued in force until the Act of September 8, 1916 (39 Stat. 783). The Act of September 8, 1916, Sec. 400, increased the tax but attempted no further definition or description of "beer."

Section 3244, R. S., defines "brewer" as follows:

> Every person who manufactures fermented liquors of any name or description for sale from malt, wholly or in part, or from any substitute therefor, shall be deemed a brewer.

In Treasury Decision 514, issued April 30, 1902, the Commissioner of Internal Revenue held that

a preparation called "beerine extract" containing 49-100 of one per cent of alcohol by volume was not beer.

In Treasury Decision 1307, issued February 5, 1908, it was stated:

> In reply you are advised that after careful consideration, I have reached the conclusion that while Section 3339, Rev. St., requires the payment of the tax of $1 per barrel on all beer, lager beer, ale, porter and other similar fermented liquors, the practical administration of the law necessitates the fixing of a point below which the alcoholic content is too inconsiderable to class the beverage as either of the liquors enumerated above, or similar thereto, or to bring same within the consideration of the Internal Revenue laws. The practice and rulings of this office have already fixed this point as one-half of one per cent in the case of sales of beverages of this character, and I see no sufficient reason for making a distinction between the manufacturer and dealer in this class of beverages.
>
> It is therefore held that beverages containing not more than one-half of one per cent of alcohol by volume do not come within the consideration of the Internal Revenue laws either as to manufacture or sale.

See also

T. D. 1360, issued May 19, 1908;
T. D. 2354, issued August 2, 1916;
T. D. 2370, issued September 18, 1916;
T. D. 2410, issued December 8, 1916.

It was perfectly within the power of Congress to include in the Act of 1918 "beer" non-intoxicating as well as intoxicating. A statute declaring certain liquors intoxicating within the meaning of the law governing intoxicating liquors, irrespective of the real inebriating quality of such liquors, is not in violation of the Constitution.

Purity Extract Co. vs. *Lynch,* 226 U. S. 192.

There the Court, speaking of Poinsetta, a non-intoxicating liquor prohibited by statute, said (page 201):

> It is also well established that, when a State exerting its recognized authority undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective. It does not follow that because a transaction, separately considered is innocuous it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the Government.

A State or the United States may adopt such measures as are reasonable, proper or needful to render the exercise of the power to prohibit the liquor traffic effective. When Congress is given authority over a subject matter, it may enact legislation having a reasonable relation to that end.

Congress may adopt not only the necessary but the convenient means necessary to the exercise of its power over the subject matter within its purview, and such means may partake of the quality of police regulations. On these principles Federal and State Courts have sustained laws prohibiting the sale of quasi intoxicating beverages because such prohibition bears reasonable relation to the end sought by the original prohibition.

Crane vs. *Campbell,* 245 U. S. 304, 307;

Hake vs. *U. S.,* 227 U. S. 309;

U. S. vs. *Cohn,* 2 Ind. Terr. 474, 52 S. W. 38;

States vs. *Frederickson,* 101 Maine 37;

State vs. *O'Connel,* 99 Maine 61, 58 Atlantic 59;

Commonwealth vs. *Blos,* 116 Mass. 56;

Commonwealth vs. *Anthes,* 12 Gray (Mass.) 29;

Commonwealth vs. *Brelsford,* 161 Mass. 61;

State of Maine vs. *Piche,* 98 Maine 348;

Commonwealth vs. *Snow,* 133 Mass. 575;

State vs. *Intoxicating Liquors,* 76 Iowa 243;

State vs. *Guinness,* 16 Rhode Island 401;

State of Iowa vs. *Yager,* 72 Iowa 421;

Ex parte Jacob Lockman, 18 Idaho 465, 110 Pac. 253;

Pennell vs. *State,* 123 N. U. (Wis.) 115.

It is matter of public notoriety that scientific men are in dispute as to the quantity of alcoholic content of a beverage required to make it intoxicating in fact. Mr. Justice Hughes recognized in *Purity Extract Co.* vs. *Lynch,* 226 U. S. 192, 204, that beverages of the type involved in the case at bar belong to a class which the public in general look upon as intoxicating.

The War Department, in administering Section 12 of the Draft Act of May 18, 1917, prohibiting the sale to soldiers of "intoxicating liquor, including beer," while recognizing that under the statute as worded the Courts must determine whether a particular drink is intoxicating, have treated beverages with an alcoholic content of 1 4-10 per cent as intoxicating.

In *U. S.* vs. *Cohn,* 2 Ind. Terr. 474, 492-501, the Court had before it for interpretation an Act of Congress making it a crime to sell "any vinous, malt or fermented liquors or any other intoxicating drinks." It was reld that the statute included a malt beverage shown to be non-intoxicating in fact.

In these circumstances, it was not only reasonable but it was conceivably essential for Congress, in order to accomplish its purpose, to determine that all beer, irrespective of its alcoholic content,

should be treated as "intoxicating" and that it should not be left open to judicial investigation whether any particular article of beer would intoxicate. It is maintained that the true interpretation of the Act of November 21, 1918, is that Congress has already determined that the article "beer," without regard to the alcoholic content, is in the class of "intoxicating" beverages and has thereby designedly foreclosed any inquiry into the matter by a court.

When Congress used the word "beer" it intended to, and as we contend did, include all beer whether intoxicating or non-intoxicating.. Where a statute expressly forbids the sale of a certain class of liquors, non-intoxicating as well as intoxicating liquors of that class are included within the prohibition.

There are three reasons that occur to us why the word "beer" as used by Congress i nthis legislation includes within its scope non-intoxicating as well as intoxicating liquors: (1) The word "beer" is defined to be "a fermented liquor made from any malt grain with hops and other bitter flavoring matters." Thus the determining characteristic of beer is not its alcoholic content, but whether it is a malt liquor. (*Tinker* vs. *State,* 90 Ala. 647.) (2) For the practical enforcement of the law it

was necessary to bar all subterfuges. (3) As a prohibition statute, to conserve man power, it is just as necessary to forbid beverages of small alcoholic content as beverages of large alcoholic content, because while the former may not readily intoxicate unless drunk in quantity, nevertheless it is doubtless equally harmful in creating the desire and the appetite, for the very reason that indulgence may be often repeated before complete intoxication ensues.

The primary rule of statutory construction makes it essential and the object of all interpretation of statutes is to ascertain the intention of the legislature, to the end that the same may be enforced. The meaning and intention must be sought first of all in the language of the statute itself. As secondary helps in arriving at the intention of the legislature, the scope and purpose of the enactment, the evil to be remedied and the history of the times should be considered. These secondary aids to construction may be used when the language of the statute is not clear or is ambiguous. If it can be said that the present statute is not clear when it says no "beer, wine," etc., then we insist there can be no doubt that the word "beer" was intended to include both intoxicating and non-intoxicating beer when the scope and purpose of the Act are considered and the circumstances and

national situation under which the Act was passed are coneemplated. Congress was enacting legislation to conserve food, fuel and man power, and was limiting the ordinary activities of individuals in a manner heretofore unknown in the history of this country. The amount of flour to be used in bread, the amount of sugar for each individual, had been restricted and many other limitations had been placed upon what the people could eat and drink. To save to the uttermost food to win the war, and to conserve our man power which was essential to victory were the thoughts before Congress when this Act was passed. It would be absolutely inconsistent with the spirit of the times to construe the Act so that beer containing 2¾ per cent of alcohol by weight could be manufactured and sold. Congress had clearly in mind and believed that the consumption of liquor containing alcohol weakens or minimizes the man power of the nation; that the food products of the country were being wasted in the making of beer; that the man power was being crippled by the failure to speed up food production and war materials; that the fuel supply was short, and the coal producers had appealed to the Government to close the liquor saloons; that there were many people manufacturing, handling and selling beer and wine; that it was a waste of energy much needed in useful industry.

The defendants in error claim that the phrase in the Act of November 21, 1918, "other intoxicating malt or vinous liquor" modifies and qualifies the words "beer" or wine," and that the statute should be read as if it said "no intoxicating beer, intoxicating wine or other intoxicating male or vinous liquor shall be sold."

Section 211 of the United States Criminal Code makes non-mailable every "obscene, lewd, or lascivious, and every filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character."

At a time prior to the insertion in the section of the word "leteer," it was held in *United States* vs. *Chase,* 135 U. S. 258-9, that a sealed letter was not a "writing" within the meaning of this law because, on the doctrine of noscitur a sociis, the word "writing" must be restricted to the types of articles which had been published; that the effect of the use of the word "publication" following the word "other" in the catch-all clause, was to restrict the somewhat ambiguous word "writing" to its usual and ordinary meaning, of a document which had been given publicity, and to prevent the inclusion therein of a type of document, to wit, a letter—not ordinarily considered a "writing."

Following the Chase decision, the statute was amended so as to include therein the word "letter." Thereupon the District Courts rendered a number of divergent decisions upon the question as to whether a sealed letter was a "letter" within the meaning of the statute, it being plain that such a letter was never published and was not of the same class or kind as a "publication." Examples of these cases are:

United States vs. *Wilson,* 58 Fed. 768, 770-1;

United States vs. *Andrews,* 58 Fed. 861.

The controversy was settled by the Supreme Court in *Andrews* vs. *United States,* 162 U. S. 420, 423-4, where it was held that the statute embraced letters even though not published.

See also *Leisy Brewing Co.* vs. *Atchison, etc., Co.,* 225 Fed. 753.

Prior to the passage of the Act of November 21, 1918, in only one instance, so far as known, has a Federal Court construed a statute of the United States of substantially identical wording. In *United States* vs. *Cohn,* 2 Ind. Terr. 474, 52 S. W. 38, the defendant was indicted for selling in the Indian Territory a malt liquor called "Rochester Tonic." There was an acquittal, but under the statutory system prevailing in the Territory, the

United States was permitted to appeal and did so. The Act of March 1, 1895 (28 St. 693), prohibited the selling, etc., of any "vinous, malt or fermented liquors, or any other intoxicating drinks of any kind whatsoever." The question was whether the malt liquor in question (Rochester Tonic) was included, notwithstanding the fact that it was shown not to be intoxicating. The Trial Court held that it was not included. The appellate tribunal held that it was included and that the adjective phrase "other intoxicating drinks" did not relate back so as to qualify or limit the words "vinous, malt or fermented" employed in the fore part of the sentence, saying (page 493):

> It is contended by the learned counsel for the defendant that the words "any other intoxicating drinks" used after the language prohibiting the manufacture, sale, giving away, etc., of any vinous, malt, or fermented liquors, are to be taken as words limiting and explaining the meaning of those words which precede them to be that the articles thus named are intoxicating also. We think that this is not necessarily the only construction that can be given to the words. We have already seen that the legislature, in the exercise of the police powers of the government, may, acting upon a subject within its powers, designate even a harmless article as being hurtful, and that such designation is binding on the courts. So in this case we think that the statute is subject to the construction that Congress intended to

> say that vinous, malt, and fermented liquors were intoxicating, and then, because a large class of intoxicants, such as whiskies, brandies, gin, and all other ardent and spirituous liquors, had not been named in the statute, the words "all other intoxicating liquors" were intended to cover them. And, whatever may be the exact grammatical construction of the language, courts are not always bound to follow it. If, by other methods allowed by the law, it can be determined that Congress otherwise intended, the Court will give such construction to the statute as by lawful methods it may find Congress actually intended. The intent of the statute is law.

In a number of States there have been decisions in complete harmony with the Cohn case, where the statutes involved were substantially identical in wording with the statute involved in the case at bar. Among these are the following:

State vs. *Ely,* 22 S. Dak. 487, 492-3, wherein the statute made it an offense to sell without license "any spirituous, vinous, malt, brewed, fermented or other intoxicating liquors."

La Follette vs. *Murray,* 81 Ohio St. 474, wherein the statute imposed a tax on the business of selling "spirituous, vinous, malt or other intoxicating liquors."

Fuller vs. *Jackson,* 97 Miss. 237, 253-6, and *Extract & Tonic Co.* vs. *Lynch,* 100 Miss. 650, wherein

the statute made it a crime to sell "vinous, alcoholic, malt, intoxicating, or spirituous liquors, or intoxicating bitters, or other drinks, which if drank to excess will produce intoxication."

Marks vs. *State,* 48 So. Rep. 864, 867, wherein an Alabama statute made it an offense to sell "alcoholic, spirituous, vinous or malt liquors, intoxicatign bitters, or beverages by whatever name called, which if drunk to excess will produce intoxication."

In re Lochman, 18 Idaho 465, 469, wherein the statute provided that the words "intoxicating liquors" as used therein should be deemed to include "spirituous, vinous, malt and fermented liquors, and all mixtures and preparations thereof, including bitters and other drinks that may be used as a beverage and produce intoxication."

In all these cases it was held that the adjective "intoxicating" following the word "other" or the adjective phrase relating to intoxicating articles following the word "other" did not relate back to or qualify the specifically enumerated articles. With substantial uniformity, the reason assigned for the conclusion was that it was evidently the intention of the legislature itself to determine that the specifically enumerated articles belonged in the class of intoxicating beverages, and thereby to foreclose litigation in the courts as to whether or not any

particular one of the specified articles was intoxicating in fact. In all of them, where the question arose, it was held in addition, in conformity with *Purity Extract Co.* vs. *Lynch,* 226 U. S. 192, that the legislature had the power thus to determine and thereby to accomplish the legislative purpose.

See also *Brown* vs. *State,* 17 Ariz. 314, wherein the provision related to "ardent spirits, ale, beer, wine or intoxicating liquor of any kind," and the Court commented extensively and favorably upon the Cohn case, supra.

That if Congress intended, in the interest of conservation, to prevent the use of food in the manufacture of beer, there was reasonable relation to that purpose in prohibiting sales of beer, after the lapse of two months from the date set for the going into effect of the prohibition on the use of foods, is likewise held in *Purity Extract Co.* vs. *Lynch, supra.* Whatever may have been the motive of Congress, in the exercise of its power, it had authority to include all reasonably related provisions it might deem essential to the complete exercise of its power.

> *United States* vs. *Doremus,* decided by the Supreme Court of the United States March 3, 1919, No. 367, October term, 1918, and the cases therein cited.

UNDER THE TERMS OF THE STATUTE BEER IS DEFINED AS INTOXICATING IRRESPECTIVE OF ITS ALCOHOLIC CONTENT.

But even if counsel for Defendants in Error should take the position that the words following do influence the meaning of the word "beer" it is the contention of Plaintiff in Error that Congress has in the Act itself defined the beer therein mentioned to be intoxicating.

Perhaps the contention as to the meaning of the words "other intoxicating liquors" may be illustrated by the following examples:

What is meant by "dogs or other animals"? Can there be any doubt that a statute thus worded would at least indirectly define a dog as an animal?

Suppose Doe should say of Roe, "Roe and those other lying, cowardly crooks." Can any one doubt that Roe would miss the meaning or that the net result of the statement would be a fight or a lawsuit?

Thomas Nelson Page in one of his Pastime Stories, "He Knew What Was Due the Court," has the character in the story give the following reason why he was released from the asylum:

"Well, you see, when I got to the asylum where that rascal got me sent, the board was in session

and I knew most of them, and their fathers before them; and they asked me what I was doing there and I made a clean breast of the whole thing—all about *that scoundrel who had been robbing me, and you and those two other fools,* and all; and that I had a damned more sense than all of you put together; and they said that they knew you all and that I was right."

Mark Twain in his introductory paragraph to "Extracts from Adam's Diary" makes use of the method:

"The new creature with the long hair is a good deal in the way. It is always hanging around and following me about. * * * *I wish it would stay with the other animals."*

These examples have been chosen at random from a casual reading, but they might be multiplied from writers, classical as well as modern, particularly from humorists and orators using invective.

The force and point of it all is, that every one, who reads or hears, knows unerringly that the words following are definitive of the preceding words. If this were not so the expressions would be meaningless.

In analyzing the word structure of the sentence no other theory can be formed than that Congress

by the Act said that "beer," irrespective of alcoholic content, is, so far as this Act is concerned, "intoxicating liquor." Otherwise there is no necessity for the word "other" i nthe Act.

Assume that the wording of the Act had been, "beer, wine or other liquors which are intoxicating," the language would then mean that Congress treated and defined beer as an intoxicating liquor and that it meant to bring within the meaning of the Act all other liquors which were intoxicating.

In such a case beer would be defined i nthe Act as an intoxicating liquor and hence a question of law, while to make a case on other intoxicating liquors, it would be necessary, in the absence of Judicial Notice, to prove as a fact that the other beverages were in fact intoxicating.

There is no little authority to sustain this contention.

The rule has been stated as follows:

> "Any liquor which is named or plainly included in the statute must be held to be intoxicating, as a matter of law, without inquiry into its actual properties, and even though, as a matter of fact, it is not capable of producing intoxication."

23 Cyc. 57, 58.
States vs. *Intoxicating Liquors,* 76 Iowa 243, 41 N. W. 6, 2 L. R. A. 408.

Commonwealth vs. *Timothy S. Gray* (Mass.) 480.

State vs. *Wittmar,* 12 Mo. 407.

Roberson vs. *State,* 100 Ala. 123, 14 So. 869.

"It is presumption of law that fermented liquors are intoxicating."

23 Cyc. 60.

State vs. *Volmer,* 6 Kan. 371.

State vs. *Spaulding,* 61 Vt. 505, 17 Atl. 844.

"If the statute specifically forbids the unlicensed sale of 'Male liquor' the question of the intoxicating properties of the liquor sold is immaterial; it is only necessary to determine whether it was a malt liquor."

23 Cyc. 60.

Eaves vs. *State,* 113 Ga. 749, 39 S. E. 318.

State vs. *O'Connell,* 99 Me. 61, 58 Atl. 59.

"The preponderance of authority is to the effect that when the word 'beer' is used, without any restriction or qualification, it denotes an intoxicating malt liquor; that when thus occurring in a nindictment or complaint, or in the evidence it is presumed to include only that species of beverage and that, being taken in that sense, it will be sufficient, unless it is shown that the particular liquor so described was non-alcoholic."

Black on Intoxicating Liquors, Sec. 17 and cases cited.

"This position seems to us unquestionably sound. It is supported by the following reasons: First, it is only in a secondary or derivative sense that the word 'beer' is used as descriptive of any liquor other than malt beer. Second, when used in relation to any non-alcoholic extract or infusion, it is properly (and almost invariably) qualified by the addition of a descriptive term as 'root beer,' 'spruce beer,' 'ginger beer,' etc. Third, when used in barrooms and drinking saloons and generally in connection with the sale of intoxicants, the word 'beer' never denotes anything but an intoxicating malt liquor."

The cases are many which hold that the catch-all clause "other" takes for granted and means that the words preceding it are considered to be of the same kind and class as those described in the words following it.

It is therefore submitted that Congress did define all beer, irrespective of its alcoholic content, as intoxicating liquor under the terms of this Act, and inasmuch as it is thus treated by Congress the Court should take Judicial notice of the fact that "beer" as mentioned in this Act is, as a matter of law, an intoxicating malt liquor.

It has been urged that Congress was only interested in prohibiting the drinking of beverages which were as a matter of fact intoxicating, and that consequently beer which was not in fact intoxicating was not intended to be included within the terms of the statute.

Assuming for the purpose of the argument that such was Congress' purpose and desire it is submitted that Congress has still prohibited the sale of any beer no matter what its alcoholic content. There are few matters

upon which men and experts differ so widely and honestly, too, as to what is intoxicating and as to when a man is intoxicated.

It is plain to see why Congress, if it desired the law to be effective, did not leave its prohibition dependent upon how a jury in each case would determine the intoxicating qualities of a particular beverage. The word "intoxicating" can scarcely be said to have a definite meaning. It denotes different things to different minds. There are almost as many meanings as there are men. It is ordinarily defined to mean:

"Producing intoxication or feelings like those of intoxication; exhilarating; exciting; maddening or stupefying with delight."—*Standard Dictionary.*

But men will differ as to what is exhilarating or exciting. Opinions run the gamut from a gentle glow to bestial insensibility in the gutter. One man will regard as intoxicating what another will consider as too mildly exhilarating to be within the term. One expert, according to his standard of intoxication, will deem a given per cent of alcohol sufficient to render a beverage intoxicating, while another will differ wholly from him. What will make one man drunk will have no apparent effect upon another. A drink which will have no effect upon a man at one time will at another time make the same man drunk. A law whose enforcement depends upon the determination by juries of such a question would be most erratic of operation and a uniform administration of it would be impossible. Into such an enforcement under such conditions would enter the local prejudices and individual opinions of the people of a community to an extent

which would be unfair both to the government and to the possible defendant.

By reason of this confusion and this divergence of opinion the enforcement of the law would be uncertain and difficult, no matter how conscientiously it might be administered. Therefore it might very well be that Congress, though it felt that there was no objection to the drinking of beer with a small or negligible alcoholic content, still, knowing the practical and every-day difficulties of such a matter, prohibited the sale of all beer in order that the main purpose of the Act might be certain of results even though some beverages, not intoxicating in themselves, were included in the prohibition. Looking at the matter from a practical every-day viewpoint, it is submitted that the construction herein urged is sound.

It is therefore submitted that it is not necessary for the Government in prosecutions under this statute to allege and prove that beer is, in fact, intoxicating; and that the Court erred in sustaining defendants' demurrer and in entering its order dismissing defendants.

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